

STATE OF MICHIGAN
IN THE SUPREME COURT

BRUCE BEHNKE and ANGELA BEHNKE,

Plaintiffs/Appellees,

v

Docket No. 127459

Michigan Court of Appeals Docket No. 248107

Chippewa Circuit Court LC No. 01-005523-NI

ESTATE OF KAREN McLEAN, deceased,

Defendant,

and AUTO-OWNERS INSURANCE CO.

Defendant/Appellant.

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DEFENDANT/APPELLANT, AUTO-OWNERS INSURANCE CO'S,
SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO
APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted by:

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD AND PROPERLY FOUND THAT PLAINTIFF/APPELLEE HAD NOT DEMONSTRATED AN OBJECTIVELY MANIFESTED INJURY, AND HAD NOT SUSTAINED A SERIOUS IMPAIRMENT OF BODY FUNCTION?

Plaintiff/Appellee says: NO

Defendant/Appellant says : YES

Court of Appeals says: NO

II. WHETHER THE TRIAL COURT’S FINDINGS OF FACT AND JUDGMENT OF NO CAUSE OF ACTION WAS SUPPORTED BY SUBSTANTIAL AND PLAUSIBLE EVIDENCE AND WAS NOT CLEARLY ERRONEOUS?

Plaintiff/Appellee says: NO

Defendant/Appellant says : YES

Court of Appeals says: NO

III. WHETHER THE COURT OF APPEALS ERRED BY APPLYING AN IMPROPER “DE NOVO” STANDARD OF REVIEW AND SUBSTITUTING ITS OWN FINDINGS OF FACT FOR THOSE OF THE TRIAL COURT, AND ERRED BY REVERSING THE TRIAL COURT’S JUDGMENT?

Plaintiff/Appellee says: NO

Defendant/Appellant says : YES

Court of Appeals says: NO

STATEMENT OF FACT

This matter relates to a low impact automobile accident which occurred on May 29, 1998. Plaintiff/Appellee was working full time as a welder at the time of the accident. He was taken off work for eight weeks, primarily to wait for the scheduling of medical testing (an MRI) and to see a neurosurgeon, but on July 27, 1998, was returned to his regular work without restrictions and has worked full time (except for lay-offs due to lack of work) ever since. (Trial Transcript pp 74, 84-85.) Plaintiff/Appellee also admitted in his sworn testimony that his activities of daily life were not changed as a result of this accident and that he has continued to engage in all of his normal activities. (Deposition of Bruce Behnke, pp 43, 50, 58.) Plaintiff/Appellee was never hospitalized, and testified that he did only seven days of home physical therapy and did not have any formal physical therapy. (Deposition of Bruce Behnke, pp 25-27.) He has no physician-imposed restrictions on his activities.

Plaintiff/Appellee's primary treating physician, Dr. Robert J. Graham, D.O., testified that the Plaintiff/Appellee had never complained to him that there were any activities in which he could no longer engage in or participate. (Deposition of Robert J. Graham, D.O., pp 71-72.) Dr. Graham also testified that, other than a mild amount of swelling on June 2, 1998, he could not testify there was any objective evidence of injury to the Plaintiff/Appellee. (Deposition of Robert J. Graham, D.O., pp 33, 36-37, 54, 60-61, 71.) This is born out by Dr. Graham's medical records. Dr. Graham referred the Plaintiff/Appellee to neurosurgeon, Dr. J. Eric Zimmerman, in June of 1998. Dr. Zimmerman saw the Plaintiff/Appellee just over one month after his accident on July 8, 1998. Dr. Zimmerman testified that in July of 1998 he did not relate Plaintiff/Appellee's complaints to the accident and that there was no objective evidence of injury. He diagnosed muscle related pain based solely on the Plaintiff/Appellee's subjective

complaints. (Deposition of Dr. J. Eric Zimmerman, M.D., pp 7-10.) Dr. Zimmerman also testified that on July 8, 1998, Plaintiff/Appellee gave him a history of suffering from migraine headaches prior to the accident in May of 1998. (Deposition of Dr. J. Eric Zimmerman, M.D., p 7.)

As noted earlier, Dr. Graham returned the Plaintiff/Appellee to work without any restrictions on July 27, 1998. (Deposition of Robert J. Graham, D.O., p 40.) Plaintiff/Appellee returned to Dr. Graham on October 21, 1998, stating he was having some pain in his neck, and for the first time complaining of headaches. Dr. Graham found that these were tension headaches associated with occipital muscular tension, and has testified that he cannot relate these headaches to the automobile accident, but felt instead that the headaches were related to the Plaintiff/Appellee's lifestyle or type of work. (Deposition of Robert J. Graham, D.O., p 42.) Dr. Graham admitted that Plaintiff/Appellee's complaints were purely subjective in nature and that there was no objective evidence of any injury. (Deposition of Robert J. Graham, D.O., p 43.) Finally, Dr. Graham admitted that the Plaintiff/Appellee had given him a medical history that established that Plaintiff/Appellee suffered from severe migraine-type headaches before the automobile accident in May of 1998. (Deposition of Robert J. Graham, D.O., pp 31, 47, 49.)

After October 21, 1998, Plaintiff/Appellee did not complain of any headaches or other problems related to the automobile accident until September 11, 2000, almost two and a half years after the accident. At that time, Plaintiff/Appellee complained to Dr. Graham that he had a severe cervical spasm and pain along with an instant headache while having sexual relations with his wife. Dr. Graham recommended that he return to see Dr. Zimmerman. Plaintiff/Appellee did not do so until over a year later, on November 21, 2001. In the meantime, he testified that he and

his wife had continued to have sexual relations on more or less a daily basis. (Deposition of Plaintiff/Appellee, Behnke, p 58.)

On November 21, 2001, Dr. Zimmerman did see the Plaintiff/Appellee for a second time. His neurological examination was normal. While he had degenerative changes to his cervical spine, Dr. Zimmerman felt these had nothing to do with the accident. All testing was negative. Dr. Zimmerman testified he could not relate the Plaintiff/Appellee's headaches to the accident and there was no objective evidence of injury, but only subjective complaints. (Deposition of Dr. J. Eric Zimmerman, M.D., pp 12-13, 24-26.)

In April 2002, Plaintiff/Appellee was seen by neurologist, Dr. Susan L. Anderson, for his complaints of headaches. Dr. Anderson's impression was "occipital neuralgia on the right, chronic daily rebound headaches from overuse of caffeine, nicotine, and Aleve . . ." (Dr. Anderson's medical records.) Dr. Anderson testified that she could not relate any of his symptoms to the accident to any degree of reasonable medical certainty or probability. Any relation would be based solely on the Plaintiff/Appellee's subjective history. Even based on that subjective history, Dr. Anderson testified only that the symptoms may have been, or could have been, related to the accident. (Deposition of Dr. Susan L. Anderson, M.D., pp 10-11, 13, 17.) Dr. Anderson testified that Plaintiff/Appellee's complaints were purely subjective, but that in her opinion, his pain was due to his pre-existing stenosis, congenital anomaly, and degenerative disc disease that was not related to the automobile accident, as well as his work as a welder. (Deposition of Dr. Susan L. Anderson, M.D., pp 15-17, 19.)

In summary, the evidence available to the trial court at the time of the bench trial in this case established that there was no objective evidence of any injury as a result of the automobile accident on May 29, 1998, other than some mild swelling seen back on June 20, 1998, and never

noted again thereafter. The evidence established the Plaintiff/Appellee had been returned to work after his appointment with the neurosurgeon eight weeks later and without any restrictions. He never had any physician-imposed restrictions after that time. The evidence established that the Plaintiff/Appellee was able to engage in all of his activities of daily life, from work, to recreational activities, including sexual relations with his wife. Based on this evidence, the trial court properly found that Plaintiff/Appellee had not sustained a serious impairment of body function, that there was no objective evidence of injury, and properly entered a judgment of no cause of action in favor of the Defendant/Appellant from whom Plaintiff/Appellee had sought uninsured motorist's coverage.

Plaintiff/Appellee subsequently filed an appeal of right with the Court of Appeals, which reversed the trial court's decision by applying an improper "de novo" standard of review and substituting its own findings of facts for those of the trial court. The Court of Appeals ignored the fact that a bench trial had been held and that the trial court's findings of fact, and judgment of no cause of action, was supported by substantial and plausible evidence and was not clearly erroneous. Not to mention that the trial judge observed the demeanor and was able to weigh the credibility of the Plaintiffs. As the dissenting judge properly pointed out, MCR 2.613(C) specifically states that findings of fact by the trial court may not be set aside unless clearly erroneous, and that in the application of this principal, regard **shall be** given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared. The two-judge majority of the Court of Appeals did not review the trial court's findings of fact under the proper "clearly erroneous standard" and unexplainably engaged in its own fact finding and weighing of the evidence. The majority of the Court of Appeals did not find that the trial court's findings of facts were clearly erroneous; they merely substituted their own findings of fact. The

two Court of Appeals Judges had not observed the Plaintiffs/Appellees while testifying so as to first hand evaluate their credibility on what were very subjective complaints of headaches and occasional claimed sexual dysfunction. The Court of Appeals majority's application of the wrong standard of review empowered them to reach the wrong result.

Defendant/Appellant subsequently filed its Application for Leave to Appeal to this Court, which on July 14, 2005, directed that the matter be set for oral argument and provided that the parties could file supplemental briefs.

ARGUMENT

THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD AND PROPERLY FOUND THAT PLAINTIFF/APPELLEE HAD NOT DEMONSTRATED AN OBJECTIVELY MANIFESTED INJURY, AND HAD NOT SUSTAINED A SERIOUS IMPAIRMENT OF BODY FUNCTION.

THE TRIAL COURT'S FINDINGS OF FACT AND JUDGMENT OF NO CAUSE OF ACTION WAS SUPPORTED BY SUBSTANTIAL AND PLAUSIBLE EVIDENCE AND WAS NOT CLEARLY ERRONEOUS.

THE COURT OF APPEALS ERRED BY APPLYING AN IMPROPER "DE NOVO" STANDARD OF REVIEW AND SUBSTITUTING ITS OWN FINDINGS OF FACT FOR THOSE OF THE TRIAL COURT, AND ERRED BY REVERSING THE TRIAL COURT'S JUDGMENT.

A. STANDARD OF REVIEW

The "clearly erroneous" standard is to be applied by the reviewing court to the trial court's finding of fact and judgment following the bench trial. *Precopio v Detroit*, 415 Mich 457; 330 NW2d 802 (1982); MCR 2.613(C).

B. DISCUSSION

In *Kreiner v Fischer*, 471 Mich 109; 131-134; 683 NW2d 611 (2004), this court provided a framework to use for determining whether a plaintiff meets the serious impairment threshold as a matter of law. First, the trial court is to determine whether a factual dispute exists "concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function." *Kreiner, supra* at 131-132. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, whether plaintiff's injuries constitute a serious impairment of a body function is a matter for the court to decide as a matter of law. MCL 500.3135 (2)(A); *Kreiner, supra* at 132. In this case, the trial court held a bench trial, and only after the bench trial had

been concluded did it determine the nature and extent of the plaintiff's injuries, and that the plaintiff's injuries did not constitute a serious impairment of a body function as a matter of fact. The trial judge was the finder of fact at the bench trial of this case.

The trial court, having made its findings of fact, then properly went on to the second step of the analysis to determine whether "an 'important body function' of the plaintiff had been impaired." *Kreiner, supra* at 132. The trial court specifically found that, assuming for the sake of argument, that the Plaintiff/Appellee had suffered an objectively manifested injury, it had not impaired an important body function, as it did not affect the Plaintiff/Appellee's ability to lead his normal life. This court in *Kreiner, supra* stated that a trial court must first determine whether an objectively manifested injury exists, and if one does, as the trial court in this case assumed, for the sake of argument in its analysis, the trial court "then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Kreiner, supra* at 132. This court states in *Kreiner, supra* that this involves an examination of the plaintiff's life before and after the accident. The court should objectively determine whether any change in his lifestyle "has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Kreiner, supra* at 132-133. "Merely 'any affect' on the plaintiff's life is insufficient because a de minimis affect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life. *Kreiner, supra* at 133.

Most importantly, with regard to residual impairments, this court noted in *Kreiner, supra* "self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point." *Kreiner, supra* at 133n 17.

Since this court issued its decision in *Kreiner, supra* the Michigan Court of Appeals has applied *Kreiner, supra* in numerous cases, most of which are unpublished. However, one

published case is worthy of note. In *Moore v Cregeur*, 266 Mich App 515; ___ NW2d ___ (May 24, 2005), the Michigan Court of Appeals applied this court's ruling in *Kreiner, supra*. In that case the plaintiff had been involved in a motor vehicle accident in which she suffered multiple rib fractures and a collapsed right lung. While those healed, the plaintiff complained of continuing neck and back pain. The Court of Appeals found that the plaintiff had failed to submit sufficient evidence that those injuries affected her general ability to lead her normal life and that those injuries did not meet the threshold requirement of MCL 500.3135(1) as a matter of law. However, the plaintiff in *Moore, supra* had also sustained some permanent vision loss and the Court of Appeals did feel that was a permanent impairment.

Applying the Court of Appeals' decision in *Moore, supra* to this case, Plaintiff/Appellee's complaints of myofascial neck pain and headaches did not meet the threshold requirement under MCL 500.3135(1). The Plaintiff/Appellee in this case did not suffer any objectively manifested injury. He did not suffer such objective injuries as multiple rib fractures or a collapsed right lung. Since July 27, 1998, Mr. Behnke has been able to work full time, has been able to engage in all of his normal activities, and has never had any physician-imposed restrictions. Mr. Behnke has admitted that he can engage in any activity he chooses. As this court pointed out in *Kreiner, supra*, self-imposed restrictions do not establish a serious impairment.

The Defendant/Appellant would also reference the many unpublished Court of Appeals' decisions which are factually indistinguishable from this case and in which the Court of Appeals found that the plaintiff's injuries did not meet the threshold as a matter of law, much less after a trial on the merits. As an example, in *Jenkins v Peterson*, 2005 WL 1788099 (July 28, 2005), the plaintiff claimed to have an injury to his shoulder that inhibited its movement, and to his lower

back. The Court of Appeals pointed out that this court in *Kreiner, supra* stated that more than a minor interruption in life is required to establish that one's general ability to lead one's normal life has been affected. *Kreiner, supra* at 130. Instead, "The objectively manifested impairment of an important body function must affect the course of a persons life." *ibid* at 130-131. Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's normal life has not been affected, then the "plaintiff's general ability" to lead his normal life has not been affected, and he does not meet the "serious impairment of body function" threshold, *Kreiner, supra* at 131. The Court of Appeals in *Jenkins, supra* also cited *Kreiner, supra* at 131 when it stated:

"Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs his specific activity may not change the fact that the person may still 'generally' be able to perform that activity." *Kreiner, supra* at 131.

In *Jenkins, supra*, the plaintiff claimed that his inability to work, play basketball, bowl, shoot pool, perform household chores, and the decreased frequency of sexual relations with his wife, were evidence that his injuries had affected his general ability to lead his normal life. However, the Court of Appeals rejected that argument noting that the doctors who had seen the Plaintiff/Appellee had determined he could return to work with no limitations. Plaintiff/Appellee had been off work for only eight weeks. The Court of Appeals determined that the Plaintiff/Appellee's restrictions of his activities were self-imposed, and pointed out that even if they were based on real pain, these cannot establish a residual impairment. Plaintiff/Appellee had continued to be able to have sexual relations with his wife, although they were allegedly less frequent. In this case, Mr. Behnke returned to work after waiting eight weeks to see the

neurosurgeon and get an MRI, has only self-imposed restrictions, and has testified that he has continued to have sexual relations with his wife on nearly a daily basis, and engages in all his normal activities.

Another example is the Court of Appeals' unpublished decision in *Spencer v Weaver*, 2005 WL 1750660 (July 26, 2005.) In that case the plaintiff had suffered a laceration and fracture of her right ankle while riding a bicycle. She initially used crutches to walk but was able to discontinue their use within two months. She did claim some residual swelling in her ankle when she did "a lot of walking" but otherwise suffered no long-term effects from the injury to her ankle. She also maintained that she injured her lower back in the accident. The Court of Appeals stated:

"In the instant case, objective medical evidence established that plaintiff suffered multiple injuries from the accident. These injuries arguably affected several of the plaintiff's important body functions. However, even taking as true, plaintiff's assertions about the changes to her life due to these injuries, she has failed to show that the injuries have affected her general ability to lead her normal life." *Kreiner, supra*. Plaintiff's continued limitations do not rise to the level of having any perceptible affect on usual activities. Consequently, we find that, even when plaintiff's ankle and back injuries are taken together, plaintiff has not satisfied the 'serious impairment of body functions' threshold for the non-economic damages set forth in MCL 500.3135."

In another unpublished Court of Appeals' opinion, *Karachy v Ly*, 2005 WL 1459811 (June 21, 2005), the plaintiff had been injured in a motorcycle accident, suffering an avulsion fracture of his right tibia and a first degree dislocated shoulder. He had undergone arthroscopic surgery on his knee, wore a sling for his shoulder injury for approximately six weeks, was wheelchair bound for a period, and then had to use crutches and had to undergo extensive physical therapy. The plaintiff, a construction worker, was unable to work for 14 weeks. However, when his doctor indicated that he could return to work approximately five months after

the accident, no restrictions were imposed. Despite the plaintiff's claims there were some residual problems with his knee, the Court of Appeals found that the plaintiff had failed to show that the injuries, and alleged residual affects, effected a significant change in his normal life. The Court of Appeals noted that limitations on his recreational and other activities appeared to be self-imposed. The Court of Appeals then stated:

“While we found this to be a close case, under the standard established in *Kreiner, supra*, by which we are bound, we hold that plaintiff has not satisfied the ‘serious impairment of body function’ threshold for the recovery of non-economic damages set forth in MCL 500.3135.”

Finally, on August 2, 2005 the Court of Appeals issued their unpublished opinion in the case of *Huff v Canter*, Court of Appeals No. 262163, attached hereto as **Exhibit A**. In that case the Plaintiff did have objective manifestation of injury and claimed to have headaches, pain, and limited motion in her neck, back, and shoulder. However, like in this case, Plaintiff had no evidence to show her employment activities were restricted after the accident. The Court of Appeals found her claim that she was unable to do housework to the same extent she had before the accident did not exceed *Kreiner's, supra* limitations. Plaintiff did not present evidence to establish that her injuries affected her general ability to lead a normal life and the Court of Appeals found she was unable to establish a serious impairment of body function. Mr. Behnke made similar claims in this case, and after a bench trial, the trial court made its findings of fact and properly found as a matter of law that he had failed to establish his injuries affected his general ability to lead his normal life and did not err in entering a judgment of no cause of action.

These are simply a few of the unpublished Court of Appeals' decisions applying *Kreiner, supra* in cases that involve injuries claimed to be worse than Plaintiff/Appellee's. These decisions have uniformly held that where a plaintiff is able to return to work after two

months, or four months, without physician-imposed restrictions, has no physician-imposed restrictions on any other activities of daily life, and is able to engage in most, if not all, of the activities that they previously engaged in despite complaints of residual pain, serious impairment of a body function is not established as a matter of law.

In this case, the trial court properly applied *Kreiner, supra* to the Plaintiff/Appellee's injuries. There was no objectively manifested injury. However, even assuming there was, Plaintiff/Appellee's ability to lead his normal life had not been affected. While he complained of some residual neck pain and headaches, he admitted that these did not prevent him from engaging in any of his normal activities. Under these facts the trial court properly found, as the trier of fact after a bench trial, that the Plaintiff/Appellee's claimed injuries did not meet the threshold of a serious impairment of a body function as a matter of law under MCL 500.3135(1).

In reversing the trial court's decision the Court of Appeals applied a "de novo" standard of review. That might have been appropriate had the trial court granted summary disposition. However, in this case the trial court held a bench trial and made its findings of fact. The trial court had an opportunity to view the witnesses, particularly Mr. and Mr. Behnke, and weigh their credibility. The trial court's judgment of no cause of action was based on its findings of fact made following that bench trial.

MCR 2.613(C) specifically provides that the findings of fact by the trial court may not be set aside unless clearly erroneous, and that regard must be given to the special opportunity of the trial court's ability to judge the witnesses who appear before it. In *Beason v Beason*, 435 Mich 791; 460 NW2d 207 (1990), this court specifically stated that an appellate court's review of a trial court's findings of fact following a bench trial is not a de novo review. An appellate

court must affirm the trial court's decision unless the trial court's ruling is "clearly erroneous" under MCR 2.613(C). This court in *Beason, supra* stated:

"If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals **may not** reverse. *Beason, supra* at 803." (Emphasis added)

A trial court's findings of fact can be set aside only where the reviewing court is "left with the definite and firm conviction that a mistake has been made". *City of Essexville v Carrollton Concrete Mix Inc.*, 259 MA 257, 265; 673 NW2d 815 (2003). The Court of Appeals did not make that necessary finding in this case, but instead substituted its own findings of fact which was a clear error on its part.

The trial court's findings of fact in this case were supported by substantial and plausible evidence. The Court of Appeals, and this court, must give deference to those findings of fact and reinstate the trial judge's decision on the merits.

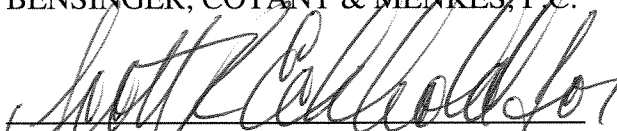
CONCLUSION

Where the trial court's findings of fact are supported by clear and plausible evidence under the review of the entire record, and were not clearly erroneous, and where the trial court properly applied *Kreiner, supra* and found at trial that the Plaintiff/Appellee had not sustained a serious impairment of body function, and was not entitled to non-economic damages, its verdict should be upheld. The majority of the Court of Appeals made its own findings of fact which were clearly improper under MCR 2.613(C). The Court of Appeals applied the wrong standard of review; their decision is further inconsistent with the continuing line of serious impairment decisions following this court's decision in *Kreiner, supra*.

Dated: _____

8/8/05

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